

The Capital Appellate Process and the Unkept Promise of the Antiterrorism and Effective Death Penalty Act

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When Congress passed the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), one of its primary goals was to expedite executions.¹ Given that the average time between a death sentence and execution in Oklahoma is more than ten years,² this goal has not been realized. As a result, inmates awaiting execution often suffer from the death row phenomenon. The death row phenomenon refers to prisoners' declining mental states due to prolonged confinement in prisons that foster intolerable, and frequently dangerous, circumstances.

This paper first examines the criminal appeals processes in Oklahoma, at both the state and federal levels. Second, the paper explores the death row phenomenon, and argues that the 1996 federal habeas revisions have done nothing to ameliorate this serious problem. Finally, the paper concludes that American courts, like their international counterparts, should recognize the death row phenomenon and acknowledge that the AEDPA has utterly failed to expedite executions. The paper proposes that inmates whose executions are not carried out within a reasonable period of time should no longer be eligible for execution, and that their sentences should be commuted to life without the possibility of parole. In the alternative, the death penalty should be abolished.

I. Introduction

When the state or federal government charges someone with a crime, due process requires that the government follow certain procedures before depriving the accused of life, liberty, or property.³ Among other things, these requirements obligate the prosecution to prove beyond a reasonable doubt every element of the offense charged. However, the American criminal justice system is far from perfect. As the laws of criminal procedure constantly evolve

and adapt, criminal defendants face the consequences of an imperfect criminal process. Although all defendants are entitled to constitutionally-mandated protections, many ultimately pay the cost of the system's failures, some with their very lives.

A. Appellate Rights and Constitutional Protections

There is no federal constitutional right to an appeal.⁴ Rather, defendants may be granted the right to appeal at the state's discretion.⁵ Today, the right to appeal is deemed a fundamental aspect of the criminal process. States recognize the magnitude of a criminal conviction and appreciate the importance of appellate review in an imperfect system. Thus, despite the absence of a federal constitutional right to appeal, every state guarantees individuals an appeal from a criminal conviction.⁶ In addition, the federal government provides appellate review for defendants in criminal cases.

The Equal Protection Clause requires that individuals be afforded equal opportunities when exercising certain rights extended by the states.⁷ The United States Supreme Court has held that there is no meaningful distinction between denying individuals appellate review rights because they could not afford them, and denying them trial stage rights simply because they are indigent.⁸ Accordingly, when a state chooses to provide a form of appellate review, it is subject to the constitutional demands of equal protection. This means that states are required to provide counsel for an indigent's first appeal *as of right*.⁹ An appeal as of right is the first, direct appeal from the trial court's judgment and sentence. This differs from a discretionary appeal, which frequently involves an appeal of the judgment and sentence after

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they have become final. Consequently, counsel is not constitutionally required for discretionary appeals.¹⁰

In *Murray v. Giarratano*, a federal district court considered three main factors before holding that indigent death row inmates pursuing post-conviction relief must be given the assistance of counsel.¹¹ First, death row inmates are not legal experts and their cases contain unusually difficult legal issues. Second, convicted defendants have a limited amount of time to prepare their complex appeals. Finally, the district court suggested that the thought of a pending date with the executioner may impede death row inmates' abilities to perform adequate legal work on their own cases.¹²

The United States Court of Appeals for the Fourth Circuit affirmed, but the United States Supreme Court reversed.¹³ The Supreme Court's reversal extended the holding of *Pennsylvania v. Finley*, a noncapital case, to capital cases. In *Pennsylvania v. Finley*, the Court held that the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause's guarantee of "meaningful access" to the courts did not require the state to appoint counsel for indigent prisoners seeking state post-conviction relief.¹⁵ The Court reasoned that because there is no federal constitutional right to a defendant's direct appeal, there is similarly no federal constitutional right to counsel for post-conviction proceedings.¹⁶ The Court compared the trial stage of a criminal proceeding to the appellate stage of such a proceeding, noting, at the appellate stage a defendant needs an attorney, "not as a shield to protect him against being 'haled into court' by the [s]tate and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt."¹⁷

B. Direct Appeal

The right to appeal a criminal conviction in Oklahoma is guaranteed by the Oklahoma Constitution and by Oklahoma statute.¹⁸ Every criminal appeal begins with a direct appeal, often to the highest state court.¹⁹ Some states, such as Oklahoma and Texas, have established courts of criminal appeals which exercise jurisdiction exclusively over criminal matters, and are the states' courts of last resort for

criminal matters.²⁰ The highest court that resolves appeals for criminal matters in Oklahoma is the Oklahoma Court of Criminal Appeals (OCCA).

Whenever a death sentence is imposed, Oklahoma statutes require the trial court to automatically initiate a direct appeal to the OCCA.²¹ A direct appeal is an appeal as of right, and because of this it cannot be involuntarily waived. At all other stages of capital appeals, defendants who wish to decline their appellate rights may do so, simply by not filing a notice of intent to appeal. By contrast, a direct appeal is automatically

commenced without any action by the defendant. If a defendant wishes to forgo a direct appeal, the court must find the defendant's waiver knowing, intelligent, and voluntary.²²

If relief is denied on direct appeal, a defendant may submit a petition for writ of certiorari to the United States Supreme Court. Although a certiorari petition to the Supreme Court is a step in the appellate process, the application does not grant the prisoner an automatic review of his case. Instead, the United States Supreme Court will either accept or deny the application to be heard. Certiorari is denied in a significant majority of cases.²³ Typically, a prisoner's conviction and sentence become final when the United States Supreme Court denies certiorari. Alternatively, if the prisoner does not seek certiorari review, the conviction and sentence become final on the day the unfiled certiorari petition is due. If the United States Supreme Court grants certiorari, the conviction and sentence become final when the Court rules on the merits of the case.

C. State Post-Conviction

Oklahoma statutes provide that a defendant who is under a sentence of death may submit an application for post-conviction relief.²⁴ Unfortunately, this appeal has not been deemed to be an appeal as of right, and appointed counsel is not constitutionally required. In addition, the defendant, rather than the trial court, must initiate the appeal in a timely manner as provided by statute. If the defendant does not file in time, post-conviction review is automatically waived.

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but two death penalty states provide counsel either by statute or practice.²⁵ Oklahoma statutes guarantee that if a defendant seeking state post-conviction relief cannot afford an attorney, one will be provided at state expense.²⁶

The only issues that may be raised in Oklahoma’s post-conviction proceedings are those that “support a conclusion either that the outcome of the trial would have been different but for the errors” or issues that support a conclusion that “the defendant is factually innocent.”²⁷ Furthermore, the issues presented in post-conviction proceedings are limited to those that could not have been previously raised on direct appeal.²⁸ For example, one common issue that could not have previously been raised on direct appeal is a claim of ineffectiveness.

D. Federal Habeas Corpus

Federal law provides that a defendant who has exhausted all of the state direct and post-conviction proceedings is entitled to federal habeas review.²⁹ Federal review is available for any federal claim which the defendant has preserved during state proceedings. Federal claims include violations of federal statutes, treaties, or the federal constitution.

The Federal Habeas Corpus Act of 1867 originally codified federal habeas corpus procedures.³⁰ More recently, the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) substantially amended habeas corpus procedures and drastically curtailed prisoners’ habeas rights.³¹ Theoretically, the AEDPA allows the opportunity of habeas relief for any prisoner who “is in custody in violation of the Constitution or laws or treaties of the United States.”³² However, section 2244 of the AEDPA radically alters

the legal landscape by placing substantial hurdles in the path of habeas petitioners. Significantly, section 2244 imposes a one-year statute of limitations on habeas petitioners. Generally, the one-year statute of limitations begins to run on the date that the conviction and sentence became final. Prior to the AEDPA, habeas petitioners were not subject to a statute of limitations. The current rule, though drastic, is simply and precisely defined: if a prisoner fails to file a habeas petition within the one year period, federal court review is barred.³³ Despite the AEDPA’s imposition of a one-year statute of limitations on death row prisoners, there is no limitation placed upon the time it takes the federal

courts to resolve habeas claims. As a result, the AEDPA has failed to accomplish the goal of dramatically shortening the time inmates spend on death row awaiting execution.

The AEDPA imposes a second limitation on habeas petitioners, which was also designed to hasten condemned prisoners to the execution chamber. The AEDPA strongly disfavors multiple or successive habeas petitions. Prior to the AEDPA revisions, prisoners were free to challenge the constitutionality of their convictions and sentences by filing multiple habeas petitions. Current law therefore reflects the congressional belief that prisoners are entitled to one, and most often only one, full and fair federal adjudication of their constitutional claims.

Notwithstanding the statute’s strong antipathy towards successor habeas petitions, inmates must still endure unconscionably long delays prior to execution. A review of Oklahoma prisoners convicted since April 24, 1996, and subject to the AEDPA’s limitations, reveals that the average time between conviction and execution is more than nine years and is gradually increasing.³⁴

As emphasized above, it is critical that a defendant first raise all claims in state court because a federal court on habeas review may only entertain those claims which were properly preserved in state court.³⁵ There has been serious disapproval of this requirement. For example, former United States

Supreme Court Justice William Brennan criticized the AEDPA’s limited grant of federal review, stressing that the statute’s restrictions have “no place where life or liberty is at stake and infringement of constitutional rights is alleged.”³⁶ Indeed, in capital cases, apart from executive clemency, federal courts provide the last opportunity to

forestall a prisoner’s execution by identifying and curing serious errors at trial or on direct appeal. Nonetheless, instead of being given greater discretion to scrutinize a broad range of potential issues, under the AEDPA federal courts are generally only permitted to review claims first raised by defense counsel in state court. If the defense lawyer’s performance was deficient, an ineffective assistance of counsel claim will likely be deemed waived if not raised until habeas review.³⁷

The restrictions imposed on federal courts under the AEDPA also have the effect of seriously enhancing the risk that valid claims will be ignored or denied. A pre-

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AEDPA study revealed that federal courts overturned death sentences in approximately 40% of cases.³⁸ A more recent study revealed the alarming fact that after the enactment of the AEDPA, the relief rate granted to capital petitioners by federal courts had declined dramatically to less than 15%.³⁹ This substantial decline demonstrates that the effect of the AEDPA is to severely hinder federal courts' abilities to grant relief where relief might be warranted.

II. Death Row Phenomenon

While the condemned await notice of a pending execution date, they are forced to endure drawn out, complex, and expensive litigation. In 2007, the average amount of time an inmate spent on death row in the United States was 153 months – more than 12 years.⁴⁰ Extensive delay results in part from the thorough review required in capital cases which flows from the “death is different” doctrine.⁴¹ As the United States Supreme Court has recognized, “the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”⁴² Consequently, capital cases require more searching judicial scrutiny than noncapital cases. Nonetheless, the impact of the AEDPA has largely been to reduce the power of federal courts to grant relief to those facing execution. Although it is critical that courts exercise great care in evaluating capital claims, evidence suggests that protracted delays damage the psychological health of inmates awaiting execution. Indeed, the claim that excessively lengthy incarceration prior to execution constitutes inhumane treatment – known as the death row phenomenon – has gained traction in other countries.⁴³ Framing the issue in federal constitutional terms, the question is whether the long periods of time prisoners spend under threat of death constitutes cruel and unusual punishment in violation of the Eighth Amendment.⁴⁴

In a vigorous dissent from the denial of certiorari in *Thompson v. McNeil*,⁴⁵ Justice Stevens expressed concern about an inmate being executed after having sat on death row for more than three decades. Calling the extensive delay of the execution cruel and unusual, he described the condemned prisoner’s life on death row for thirty-two years:

In 2007, the average amount of time an inmate spent on death row in the United States was 153 months – more than 12 years.

As he awaits execution, petitioner has endured especially severe conditions of confinement, spending up to [twenty-three] hours per day in isolation in a [6-by-9] foot cell. Two death warrants have been signed against him and were stayed only shortly before he was scheduled to be put to death. The dehumanizing effects of such treatment are undeniable.⁴⁶

Some death-sentenced inmates have gone to great extremes to escape the agony of awaiting execution. Federal death row inmate David Paul Hammer attempted suicide on the eve of the execution of his fellow inmate and friend, Timothy McVeigh.⁴⁷ Distraught over McVeigh’s looming execution, Hammer, a diabetic, injected insulin into a vein in his arm in an attempt to kill himself.⁴⁸ The attempt failed when a guard discovered Hammer and he was treated.⁴⁹ Hammer later stated that he kept wondering when his “own date with the executioner [would] arrive,” he wished he were dead, and “death would be a welcome relief.”⁵⁰

Condemned Oklahoma prisoner Robert Brecheen likewise tried to cheat the executioner. In the hours before his execution, Brecheen took an overdose of pills he had hoarded. When guards arrived at his cell for his pre-execution shower, they discovered him. Officials rushed Brecheen under heavy guard to the hospital in McAlester where his stomach was pumped and his life was saved. Within two short hours, he was back at the Oklahoma State Penitentiary, strapped to a gurney, and officially poisoned to death.⁵¹

Other capital prisoners have been more successful in taking their own lives. Jeffrey Remington was on Virginia’s death row until he committed suicide in February of 2004.⁵² Remington had spent nearly five years on death row awaiting execution. Similarly, a Texas death row inmate, William Robinson, committed suicide by hanging himself in his cell with a bed sheet. Robinson was sentenced to die by a jury after only eleven minutes of deliberation.⁵³ After his death, Mr. Robinson’s former attorney expressed outrage at the circumstances of Robinson’s confinement. Robinson’s attorney called it “appalling” that despite Robinson’s prior documented suicide attempts and paranoid schizophrenia, he had been left unsupervised.⁵⁴

Just three days prior to Robinson’s suicide, another Texas death row inmate, Jesus Flores, killed himself.⁵⁵ After slashing his own throat, Flores tried to write a

note on his prison cell wall with his own blood.⁵⁶ When sentenced to die, Flores was only nineteen year old. He had spent approximately seven years awaiting execution.⁵⁷

After touring Oklahoma’s death row and interviewing inmates that were housed there, Amnesty International reported it as “cruel, inhuman or degrading treatment in violation of international standards.”⁵⁸ Amnesty reported an array of inhuman conditions. There are no windows inside the tiny concrete cells where prisoners are housed 23 hours of the day.⁵⁹ H-Unit is partially underground, and the only natural sunlight prisoners ever receive comes from what prison officials call the “exercise yard.” The exercise yard is a tall concrete box covered with wire so thick that sunlight is only able to seep through on certain months and for only a few hours of the day.⁶⁰ Prisoners receive fifteen minute showers three times a week; the unadjusted water temperature will vary from ice cold to scalding hot.⁶¹ Finally, the control room allows guards to communicate with prisoners and manage every necessary task electronically, requiring little to no human contact.⁶² Consequently, the prisoners have virtually no human contact with anyone other than their cellmates and attorneys.

A capital prisoner is typically confined to this

environment for years as he exercises his statutory rights to appeal. Indeed, sometimes these conditions prove to be unbearable, and the risk of suicide greatly increases as some inmates undoubtedly grow to welcome death.

III. Conclusion

The Antiterrorism and Effective Death Penalty Act was passed with the intention of expediting the appellate process, while maintaining fair procedures to accurately assess whether death is an appropriate punishment in a given case. However, the death row phenomenon has demonstrated how the AEDPA has, in fact, utterly failed in this regard. Prisoners remain incarcerated in cruel conditions for prolonged periods of time.

Abolition of the death penalty is one appropriate solution to the problem. Abolition would not only completely eliminate the death row phenomenon, but would also make society safer

and save taxpayers money. Another solution would be to automatically commute a prisoner’s death sentence to life without the possibility of parole when his execution is not carried out within a reasonable period. This solution would curtail the death row phenomenon by dramatically reducing the amount of time a prisoner could spend on death row.

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Appendix

Oklahoma Executions Where Conviction and Sentence Were Post AEDPA (After April 24, 1996)⁶³

Name	Received by DOC	Date Executed	# of days in DOC before Execution
KNIGHTON, Robert Wesley	12/7/90	5/27/03	4,555
MILLER JR., George James	1/27/97	5/12/05	3,028
THORNBURG, Richard Allen	5/19/97	4/18/06	3,257
PATTON, Eric Allen	12/2/96	8/29/06	3,558
MALICOAT, James Patrick	3/2/98	8/31/06	3,105
BLAND, Jimmy D	2/23/98	6/26/07	3,411
WELCH, Frank D	12/1/98	8/21/07	3,186
SHORT, Terry L	4/28/97	6/17/08	4,069
CUMMINGS JR., Jesse J	6/3/96	9/25/08	4,498
BROWN, Darwin D	4/9/97	1/22/09	4,307
GILSON, Donald	5/26/98	5/14/09	4,007
DELOZIER, Michael P	6/19/96	7/9/09	4,769
WACKERLY, Donald R	5/18/98	10/14/10	4,532
DUTY, John D	10/28/02	12/16/10	2,971
ALVERSON, Billy D	7/21/97	1/6/11	4,917

- ¹ Randall Coyne & Lyn Entzeroth, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 763 (Carolina Academic Press 3rd ed. 2006).
- ² See Appendix.
- ³ *Id.*
- ⁴ *McKane v. Durston*, 153 U.S. 684 (1894).
- ⁵ *Id.* at 687-88.
- ⁶ States may provide more rights to criminal defendants than the federal government, but not less.
- ⁷ *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality) (holding that when indigent defendants cannot afford to obtain trial transcripts, the state must furnish them free of charge).
- ⁸ *Id.*
- ⁹ *Douglas v. California*, 372 U.S. 353 (1963). In addition to ensuring that indigent defendants receive the assistance of counsel, the direct appeal counsel provided must be effective.
- ¹⁰ *Ross v. Moffitt*, 417 U.S. 600 (1974); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 491 U.S. 1 (1989).
- ¹¹ *Murray v. Giarratano*, 492 U.S. 1, 4 (1989).
- ¹² *Id.*
- ¹³ *Giarratano v. Murray*, 847 F.2d 1118, (4th Cir. 1988).
- ¹⁴ *Id.* at 10.
- ¹⁵ *Id.*
- ¹⁶ *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).
- ¹⁷ *Id.* citing *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974).
- ¹⁸ OKLA. STAT. tit. 22, § 1089 (2001); OKLA. STAT. tit. 21, § 701.13 (2001); Okla. CONST. art. II, § 6.
- ¹⁹ Some states provide an intermediate level of review by a state court of appeals, and further, final review by a state supreme court.
- ²⁰ Both Oklahoma and Texas have state supreme courts with jurisdiction only over civil matters.
- ²¹ OKLA. STAT. tit. 21, § 701.13 (2001).
- ²² *Grasso v. Oklahoma*, 857 P.2d 802 (Okla. Crim. App. 1993).
- ²³ Supreme Court of the United States, <http://www.supremecourt.gov/faq.aspx> (last visited Oct. 20, 2010). The United States Supreme Court grants certiorari in fewer than 1% of the petitions it reviews each year.
- ²⁴ OKLA. STAT. tit. 22, § 1089 (2001).
- ²⁵ Stafford Smith & Starns, Folly by Fiat: *Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 Loy. L. Rev. 55, 56 (1999). Georgia and Louisiana do not provide counsel for post-conviction proceedings.
- ²⁶ *Id.*
- ²⁷ OKLA. STAT. tit. 22, § 1089 (2001).
- ²⁸ *Id.*
- ²⁹ U.S. CONST. art. I, § 9, cl. 2. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."
- ³⁰ 28 U.S.C. § 2254 (1996).
- ³¹ 28 U.S.C. § 2244(d) (1996).
- ³² 28 U.S.C. § 2254 (1996).
- ³³ 28 U.S.C. § 2244(d) (1996).
- ³⁴ See Appendix.
- ³⁵ *Id.*
- ³⁶ *Sanders v. United States*, 373 U.S. 1, 83 (1963).
- ³⁷ Deficient performance alone is not enough to amount to ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984), provides that counsel will only be deemed to be ineffective if a defendant shows that counsel's performance was deficient and that the deficient performance prejudiced the defense. This test allows for even the most disinterested, ignorant, lawyer to be found effective. The "foggy mirror test" has been suggested, somewhat cynically, as a means of assessing effectiveness in capital cases. To test for effective counsel, simply hold a mirror before the suspect lawyer's lips. If the mirror fogs, counsel is effective. Randall Coyne, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS TEACHER'S MANUAL 210 (Carolina Academic Press 2007).
- ³⁸ Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, CRIMINAL PROCEDURE 1339 (West 5th ed. 2009).
- ³⁹ *Id.*
- ⁴⁰ Death Penalty Information Center, <http://www.deathpenaltyinfo.org/time-death-row> (last visited Dec. 16, 2009).
- ⁴¹ *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).
- ⁴² *Id.*
- ⁴³ *Pratt v. Attorney General for Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc).
- ⁴⁴ U.S. CONST. amend. VIII.
- ⁴⁵ *Thompson v. McNeil*, 129 S.Ct. 1580 (2009) (Stevens, J., dissenting)
- ⁴⁶ *Id.*
- ⁴⁷ Federal Death Row Inmate Attempts Suicide, <http://ccadp.org/davidhammer-newsjuly2001.htm> (last visited Dec. 16, 2009).
- ⁴⁸ *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ The New York Times, <http://www.nytimes.com/1995/08/12/us/a-doomed-inmate-drugs-himself-is-revived-and-then-executed.html> (last visited Dec. 16, 2009).
- ⁵² Virginians for Alternatives to the Death Penalty, <http://www.vadp.org/michaellenz.html> (last visited Dec. 16, 2009).
- ⁵³ Associated Content, http://www.associatedcontent.com/article/583699/texas_death_row_inmate_william_robinson.html (last visited Dec. 16, 2009).
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ *Id.*
- ⁵⁸ The Oklahoma Coalition to Abolish the Death Penalty, <http://www.ocadp.org/deathrow/h-unit/h-unit.html> (last visited Dec. 16, 2009).
- ⁵⁹ *Id.*
- ⁶⁰ Interview with Scott Eizember, Oklahoma death row inmate, McAlester, Oklahoma (Jan. 2, 2009).
- ⁶¹ The Oklahoma Coalition to Abolish the Death Penalty, <http://www.ocadp.org/deathrow/h-unit/shower.html> (last visited Dec. 16, 2009).
- ⁶² *Id.*
- ⁶³ Oklahoma Department of Corrections, <http://www.doc.state.ok.us/offenders/deathrow.htm> (last visited Feb. 27, 2011). Statistics exclude volunteers Earl Alexander Frederick, Sr. and Harold Loyd McElmurry.